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May 5, 2005

Peter Blumberg
Attorney, Office of General Counsel
Federal Election Commission
999 E Street, NW
Washington, DC 20463

RECEIVED
FEDERAL ELECTION
COMMISSION
OFFICE OF GENERAL
COUNSEL

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VIA FACSIMILE – (202) 208-2491

Dear Mr. Blumberg:

Attached please find the response of Bush-Cheney '04, Inc., to the Commission's Factual and Legal Analysis in MUR 5525.

Originals will be hand-delivered to the Commission. If you have any further questions, please do not hesitate to contact me.

Sincerely,

Thomas J. Josefiak
General Counsel

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BEFORE THE FEDERAL ELECTION COMMISSION

In the Matter of)
Bush-Cheney '04, Inc. and David Herndon,)
in his official capacity as Treasurer)

MUR 5525

REPLY BRIEF OF RESPONDENT BUSH-CHENEY '04, INC.

Introduction

Bush-Cheney '04, Inc. (the "Bush Campaign"), hereby responds to the Office of General Counsel's Factual and Legal Analysis which formed the basis for the Commission's finding dated February 17, 2005 in the above-captioned matter.

The attached sworn statements, together with the law, clearly demonstrate that the Bush Campaign did not coordinate communications or other expenditures with Swift Boat Veterans for Truth ("SBVT") in violation of the Federal Election Campaign Act, as amended ("FECA"). There is no basis in law or fact for the Commission to proceed with its investigation.

I. The Bush Campaign's Relationship with Kenneth Cordier Did Not Constitute Illegal Coordination with Swift Boat Veterans for Truth.

A. Statement of Facts

The Bush Campaign's Veterans' Coalition, and its National Steering Committee, were formed to help foster support for President Bush among the veterans community. *Declaration of David Castillo ¶¶ 2,3* (Attachment 1). The National Steering Committee consisted of approximately sixty (60) unpaid volunteer members. Neither Kenneth Cordier, nor any other member of the National Steering Committee played any role in the

strategic campaign or policy related activities of the Bush Campaign. *See id* ¶ 4. The National Steering Committee's role was to highlight its members' endorsements of President Bush. *See id* ¶ 3. National Steering Committee members were not provided with any non-public information or material in connection with the Bush Campaign. *See id* ¶ 4.

Members of the National Steering Committee had access only to Bush Campaign information and materials that were already publicly available, and virtually all of this information was available on the Bush Campaign's website. *Id.* For example, members of the National Steering Committee were provided with transcripts of public speeches delivered by President Bush, press releases relevant to veterans issues, and widely-distributed brochures detailing President Bush's policy positions. *Id.*

Mr. Cordier, like every other member of the National Steering Committee, was authorized to represent the Bush Campaign solely in his honorary capacity as a National Steering Committee member. No member of the National Steering Committee was authorized, either expressly or impliedly, to serve as the Bush Campaign's agent to request or suggest a communication, be materially involved in the decisions regarding a communication, or engage in any discussion, deliberation, or participation with any outside organization in connection with a communication. *See id* ¶ 4.

In particular, neither Mr. Cordier nor any other National Steering Committee member, was authorized by the Bush Campaign to participate in any SBVT activities or otherwise serve as the Bush Campaign's agent with respect to SBVT. Nor did the Bush campaign have any prior knowledge of Mr. Cordier's appearance in a SBVT television advertisement. The Bush Campaign first learned of the SBVT television advertisement,

and Mr. Cordier's involvement in that advertisement, the very day that advertisement was first scheduled to air. *See id.* ¶¶ 4, 5, and 6. Indeed, Mr. Cordier resigned from his position as a National Steering Committee member and ceased his association with the Bush Campaign the very day that the SBVT ad in which he appeared first aired. *See id.* ¶ 6.

B. Argument

1. The Bush Campaign was not "Materially Involved" with the Swift Boat Veterans for Truth Communication

In order for a candidate or authorized committee to violate the conduct prong of the coordination test, the Commission must find that the candidate or authorized committee was "materially involved" with the outside communication in question. "Material involvement" requires that a candidate or authorized committee, or agent of either, be materially involved in decisions regarding (i) a communication's content; (ii) its intended audience; (iii) the communication's means or mode; (iv) the media outlets used; (v) the timing or frequency of the communication; or (vi) the duration of a broadcast, cable or satellite communication. 11 C.F.R. § 109.21 (d)(2). Nowhere do complainants allege that Mr. Castillo or any other Bush Campaign representative was part of SBVT's formal decision making process. Thus, the inquiry must focus on the nature of the information provided to Mr. Cordier by the Bush Campaign.

As the Commission explained in its Explanation and Justification, the "material involvement" inquiry focuses on "the nature of the information conveyed and its importance, degree of necessity, influence or the effect of involvement by the . . . authorized committee, . . . or their agents in any of the communication decisions enumerated in 11 CFR 109.21(d)(2)(i) through (vi)." 68 Fed. Reg. 421, 433 (Jan. 3,

2003). Importantly, “material involvement” cannot be established by access to, or use of, public information. The Commission itself has stated that “the ‘material involvement’ standard would not be satisfied . . . by a speech to the general public, but is satisfied by remarks addressed specifically to a select audience, some of whom subsequently create, produce, or distribute public communications.” 68 Fed. Reg. at 434, 432 (expanding on these hypothetical scenarios with respect to the “request or suggestion” standard). The inescapable conclusion to draw from these two discussions is that information made available to the general public, even if subsequently utilized by a third party in planning and implementing a communication, cannot form the basis of a finding that the coordination’s conduct prong has been satisfied.

In this case, National Steering Committee members *only* had access to exactly the same Bush Campaign information as the general public. *See id* ¶ 4. Further, to the best of the Bush Campaign’s knowledge, Mr. Cordier did not utilize any of the publicly available Bush Campaign information to which he, along with the rest of the world, had access, in connection with the SBVT television advertisement.¹

Mr. Cordier was never authorized to act as an agent of the Bush Campaign vis-à-vis SBVT (or any other group). The information to which Mr. Cordier had access as a member of the National Steering Committee was all publicly available information, the use of which cannot form the basis of a coordination finding. Indeed, it does not appear that Mr. Cordier ever used any *publicly* available Bush Campaign information in connection with his SBVT activities. Finally, the Bush Campaign was not even aware of

¹ Based on its own viewing of the advertisement at issue, it appears to the Bush Campaign that Mr. Cordier discusses solely his own personal experiences as a Vietnam War veteran, and his personal reaction to Senator Kerry’s inflammatory testimony before Congress during the 1970s. Mr. Cordier’s personal thoughts and recollections are, of course, his own and were certainly not provided to Mr. Cordier by the Bush Campaign

Mr. Cordier's involvement in the SBVT advertisement until after that advertisement was produced and the media buy made. These facts clearly establish that no "material involvement" took place between the Bush Campaign and SBVT.

2. No "Substantial Discussion" Took Place Between the Bush Campaign and Swift Boat Veterans for Truth.

In order to satisfy the "substantial discussion" element of the conduct inquiry the communication must be "created, produced, or distributed after one or more substantial discussions about the communication between the person paying for the communication, or the employees or agents of the person paying for the communication, and the candidate who is clearly identified in the communication, or his or her authorized committee, or his or her opponent or the opponent's authorized committee . . . , or an agent of any of the foregoing." 11 C.F.R. § 109.21(d)(3). Despite complainant's unsupported assertions, no such "substantial discussions" ever took place here.

Mr. Castillo, who was the Bush Campaign's Coalitions Director, and oversaw the Veterans' Coalition, was unaware of the SBVT advertisement, and Mr. Cordier's appearance in that advertisement, until Mr. Cordier telephoned Mr. Castillo on the day that the advertisement was first scheduled to air to inform Mr. Castillo of the advertisement's existence and his appearance in it. *See id.* ¶ 6. In the course of this telephone call, Mr. Cordier provided Mr. Castillo with no information about the content of the advertisement or any broadcasting details. *Id.* Mr. Cordier simply stated that he was appearing in a SVBT advertisement that would run later that day, and Mr. Castillo expressed surprise upon learning these facts. *Id.* Further, Mr. Castillo's attached declaration makes clear that no information about "the candidate's . . . campaign plans,

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projects, activities, or needs” was conveyed to Mr. Cordier. *See id* ¶ 4; 11 C.F.R. § 109.21(d)(3). Moreover, there is no evidence, nor have complainants alleged, that Mr. Cordier ever used any *public* Bush Campaign information in connection with any SBVT activity. The interactions between Mr. Cordier and Mr. Castillo fail to satisfy the substantiality requirement of 11 C.F.R. § 109.21(d)(3). Put simply, no “discussions about the communication” took place between Mr. Castillo and Mr. Cordier.²

Even if this telephone conversation were characterized as a “substantial discussion,” an assertion respondent rejects, its occurrence *followed* production and placement of the advertisement. The advertisement was produced and scheduled for air time *before* Mr. Castillo and the Bush Campaign ever learned of it. The regulation requires the communication to be “created, produced, or distributed *after* one or more substantial discussions about the communication . . . ” 11 C.F.R. § 109.21(d)(3) (emphasis added). Thus, the above analysis of the definitional aspects of “substantial discussion” notwithstanding, the relevant interaction between the Mr. Cordier and Mr. Castillo does not satisfy the regulation’s plain requirement, and cannot constitute a violation.

II. The Bush Campaign Had No Involvement with Either the Florida Political Flyer or the Political Rallies Advertised Therein.

The complainant, wholly without support, alleges that the political flyer in question was “distributed” in a Bush Campaign office in Alachua, Florida, thus supporting a coordination finding against the Bush Campaign. (Notably, the Bush

² The Commission has indicated that “discuss” refers to “an interactive exchange of views or information.” See 68 Fed. Reg. at 435. Mr. Castillo’s declaration makes clear that the single conversation that he had with Mr. Cordier concerning the advertisement, which took place the morning the advertisement was scheduled to air and was the first Mr. Castillo had learned of its existence, contained no such “interaction,” and does not begin to approach “discussion” for purposes of Section 109.21(d).

Campaign did not have an office in Alachua, Florida.) The Bush Campaign, both on a national level and within the State of Florida, was unaware of, did not authorize, and played absolutely no role in either the creation or distribution of the political flyer in question, or the August 21 or August 22 political rallies advertised therein. *See Castillo Decl. ¶¶ 7,8 (Att. 1); Declaration of Brett Doster (Attachment 2); and Declaration of Mandy Fletcher (Attachment 3).* In short, the Bush Campaign had nothing to do with either the political flyer or rallies. The conduct standard set forth in Section 109.21(d) has not been met, and therefore coordination cannot exist.

Conclusion

For the foregoing reasons, the Commission should take no further action in regard to MUR 5525 and close this matter with respect to the Bush Campaign.

Respectfully submitted,



Thomas J. Josefiak
General Counsel
Republican National Committee
310 First Street, SE
Washington, D.C. 20003

ATTACHMENT 1

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DECLARATION OF DAVID CASTILLO

1. My name is David Castillo. During the 2004 Presidential Election I worked as national "Coalitions Director-Veterans, Labor, First Responders", for the Bush-Cheney '04 Campaign ("BC'04"), located in Arlington, Virginia. I began work in this position in September 2003. I held this position through December 2004. This Declaration is based upon facts within my personal knowledge.

2. As National Coalitions Director for BC'04, I oversaw three coalition groups – labor, first responders (police and firemen), and veterans. The Veterans' Coalition was formed in order to assist in securing veteran endorsements of President Bush's re-election, and to disseminate the President's record, message, and policy proposals to the veteran community. As part of my duties I assisted in organizing, scheduling, and managing all official BC'04 veteran-related campaign events nationwide.

3. The Veterans' Coalition's primary role in the campaign was to gain support for President Bush's re-election from United States veterans. The Veterans' Coalition included an honorary National Steering Committee. The National Steering Committee consisted of approximately sixty (60) unpaid volunteers who were veterans of the United States Armed Services. National Steering Committee members were chosen for their past service, their support for President Bush, and for their name recognition among the veterans' community. The National Steering Committee's purpose was not only to garner endorsements from its high profile members but also because of their standing in the veterans' community, hopefully, encourage other veterans to support the President. I would also informally seek Members advice

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on issues important to veterans. Ken Cordier, a United States veteran with high name-recognition in the veterans' community, was a member of the National Steering Committee.

4. National Steering Committee members' role, including Mr. Cordier's, in BC'04 was purely honorary in nature. Neither the National Steering Committee nor any of its individual members controlled or engaged in any policy or strategic activity in connection with the BC'04 campaign. National Steering Committee members never possessed actual authority, either express or implied, on behalf of BC'04 to request or suggest a communication, be materially involved in the decisions regarding a communication, to provide material information to assist another person in creating or distributing a communication, or to make or direct a communication based upon material information from BC'04. Further, at no time did I nor, to my knowledge, any other person employed by BC'04, ever communicate or otherwise provide to the National Steering Committee or any of its individual members any information concerning the presidential campaign (e.g., private polling information, internal strategic campaign memoranda, etc.) that was not already publicly available information. To my knowledge, all the information that was provided to National Steering Committee members, including Mr. Cordier, was also available to the public on the BC'04 website, www.georgewbush.com, or from state or national Bush-Cheney campaign headquarters. In some instances this information was proactively sent to potential voters by the campaign through emails or mailings. This information included, among other things, the President's policy proposals and positions on various issues affecting veterans, summaries of the President's recent speeches, and announcements of endorsements for the President. National Steering Committee members often appeared, and sometimes spoke, at BC'04 events that were targeted at veterans groups, and spoke in support of

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President Bush's re-election. On occasions when National Steering Committee members spoke at BC'04 events their speeches were not scripted by BC'04.

5. At no time did I nor, to my knowledge, any other person employed by BC'04, ever suggest or direct any National Steering Committee member, including Mr. Cordier, or any other person, to make contact with or assist the Swift Boat Veterans For Truth group in any way.

6. I first learned that Ken Cordier would be appearing in a television advertisement paid for by Swift Boat Veterans for Truth in August, 2004, on the morning of the same day that the advertisement was scheduled for its first broadcast. Mr. Cordier informed me of this himself over the telephone. During this conversation, Mr. Cordier provided me with no further details other than that he was appearing in the ad. I had no prior knowledge of any contact between Mr. Cordier, or any other Veterans' Coalition member, and Swift Boat Veterans for Truth. During this telephone conversation I expressed surprise to Mr. Cordier that he was involved in a advertisement that was being paid for by a group outside the BC'04 campaign. Mr. Cordier resigned from the National Steering Committee, and to my knowledge ceased all involvement with BC'04, that same day before the advertisement aired.

7. I was not aware of the Florida political rally flyer at issue in the above-captioned MUR, or of the August 21 and 22 rallies advertised in the flyer, until some time after August 22 when I read about this issue in a newspaper. I did not fund any portion of, authorize, or otherwise encourage development of the flyer at issue in the above-captioned MUR, nor did I authorize any person, group, or entity to do so on BC'04's behalf. I did not communicate, or circulate the flyer, represent BC'04 as being attached with or involved with in any way, or

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otherwise promote the August 21 and/or August 22 rallies advertised in this flyer, nor did I authorize any person, group, or entity to do so on BC'04's behalf.

8. I did not fund any portion of, authorize, or otherwise encourage either the August 21 or August 22 political rally that is referenced in the flyer at issue in the above-captioned MUR, nor did I authorize any person, group, or entity to do so on BC'04's behalf. I did not authorize any person to appear at, or otherwise participate in, either the August 21 or August 22 rally on BC'04's behalf. I did not participate in either the August 21 or August 22 rally, nor did I authorize any person, group, or entity to do so on BC'04's behalf.

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I declare under penalty of perjury that the foregoing is true and correct to the best of my knowledge, information, and belief.

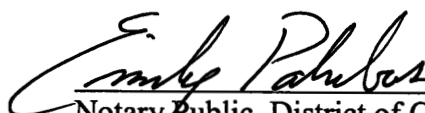
Dated: May 5, 2005


David Castillo

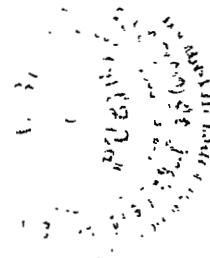
DISTRICT OF COLUMBIA

Sworn to and subscribed before me this 5th day
of May, 2005

EMILY PALUMBOS
Notary Public, District of Columbia
My Commission Expires 01/09


Notary Public, District of Columbia

My Commission Expires: 01/09



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ATTACHMENT 2

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DRAFT

Re: MUR 5525 (Bush-Cheney '04)

DECLARATION OF BRETT DOSTER

1. My name is Brett Doster. During the 2004 Presidential Election I worked as the Executive Director for the Bush-Cheney '04 Campaign ("BC'04") in the State of Florida, located at 420 East Jefferson Street, Tallahassee Florida. I began work in this position in October, 2003. I held this position through November, 2004. This Declaration is based upon facts within my personal knowledge.

2. As Executive Director for BC'04 in Florida my duties included serving as the liaison between the national BC'04 headquarters and the BC'04 Florida team and executing the BC'04 campaign strategy in Florida. Among other things these duties included authorizing, approving funding for, planning, and assisting in managing official BC'04 campaign events. During my tenure as BC'04's Executive Director in Florida, I was aware of official campaign events that were scheduled in Florida during the 2004 Presidential campaign.

3. BC'04 did not fund any portion of, authorize, or otherwise encourage development of the flyer at issue in the above-captioned MUR, nor did BC'04 authorize any person, group, or entity to do so on BC'04's behalf. Neither I nor any other person employed at BC'04 communicated, or circulated the flyer, represented BC'04 as being attached with or involved with in any way, or otherwise promoted the August 21 and/or August 22 rallies advertised in this flyer, nor did BC'04 authorize any person, group, or entity to do so on BC'04's behalf.

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Attorney Work Product

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4. BC'04 did not fund any portion of, authorize, or otherwise encourage either the August 21 or August 22 political rally that is referenced in the flyer at issue in the above-captioned MUR, nor did BC'04 authorize any person, group, or entity to do so on BC'04's behalf. BC'04 did not authorize any person to appear at, or otherwise participate in, either the August 21 or August 22 rally on BC'04's behalf. Neither I nor, to my knowledge, any other person employed at BC'04 participated in either the August 21 or August 22 rally, nor did BC'04 authorize any person, group, or entity to do so on BC'04's behalf.

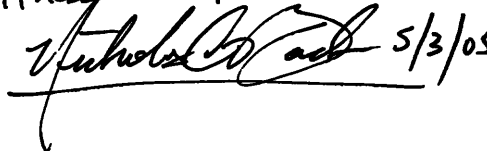
I declare under penalty of perjury that the foregoing is true and correct to the best of my knowledge, information, and belief.

Dated: ~~April~~ ^{MM 3} 3, 2005



Brett Doster

I personally know Brett Doster
who I witnessed sign this.

 5/3/05



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ATTACHMENT 3

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DRAFT

Re: MUR 5525 (Bush-Cheney '04)

DECLARATION OF MANDY FLETCHER

1. My name is Mandy Fletcher. During the 2004 Presidential Election I worked as the Political Director for the Bush-Cheney '04 Campaign ("BC'04") in the State of Florida, located at 420 East Jefferson Street, Tallahassee, Florida 32301. I began work in this position in February 2004. I held this position through November 2004. This Declaration is based upon facts within my personal knowledge.

2. As Political Director for BC'04 in Florida my duties included serving as the liaison between BC'04's political personnel and the BC'04 Florida political team and executing the BC'04 political strategy in Florida, and assisting Executive Director Brett Doster. Among other things these duties included authorizing, approving funding for, planning, and assisting in managing official BC'04 campaign events. During my tenure as Political Director, I was aware of official BC'04 campaign events that were scheduled in Florida during the 2004 Presidential campaign.

3. BC'04 did not fund any portion of, authorize, or otherwise encourage development of the flyer at issue in the above-captioned MUR, nor did BC'04 authorize any person, group, or entity to do so on BC'04's behalf. Neither I nor any other person employed at BC'04 communicated, or circulated the flyer, represented BC'04 as being attached with or involved with in any way, or otherwise promoted the August 21 and/or August 22 rallies advertised in this flyer, nor did BC'04 authorize any person, group, or entity to do so on BC'04's behalf.

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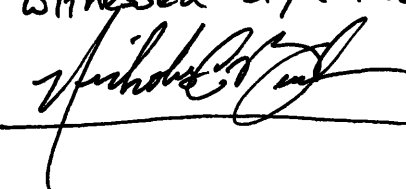
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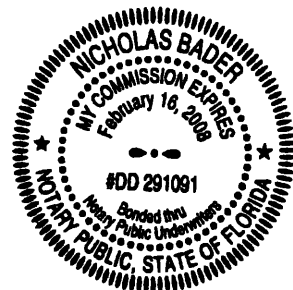
4. BC'04 did not fund any portion of, authorize, or otherwise encourage either the August 21 or August 22 political rally that is referenced in the flyer at issue in the above-captioned MUR, nor did BC'04 authorize any person, group, or entity to do so on BC'04's behalf. BC'04 did not authorize any person to appear at, or otherwise participate in, either the August 21 or August 22 rally on BC'04's behalf. Neither I nor, to my knowledge, any other person employed at BC'04 participated in either the August 21 or August 22 rally, nor did BC'04 authorize any person, group, or entity to do so on BC'04's behalf.

I declare under penalty of perjury that the foregoing is true and correct to the best of my knowledge, information, and belief.

Dated: May 3, 2005


Mandy Fletcher

I personally know Mandy Fletcher,
who I witnessed sign this.
 5/3/2005



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